Supreme Court, U. S.
FILED
OCT 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-540

WILLIAM A. MOORE, ET AL.,

V. ....PETITIONER

HAMPTON ROADS SANITATION DISTRICT COMMISSION

AND

CITY OF NEWPORT NEWS,

....DEFENDANTS

APPENDIX FOR THE PETITIONER

WILLIAM MILLS KRIEGER, ESQUIRE
714 J. CLYDE MORRIS BLVD.
NEWPORT NEWS, VIRGINIA

....COUNSEL OF RECORD
FOR THE PETITIONER

FRED R. SURFACE & ASSOC. INC., HERITAGE BUILDING, RICHMOND, VA. (804) 643-7789

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

WILLIAM A. MOORE, ET AL.,

Plaintiffs.

v.

HAMPTON ROADS SANITATION DISTRICT COMMISSION
and

CITY OF NEWPORT NEWS,

Defendants

CIVIL ACTION NO. 100-72-NN

OPINION AND ORDER

March 10, 1975

This action began with the filing of a complaint on September 15, 1972, by William A. Moore, Carrie Carter, Gayle Hogge, Piankatank Oyster Co., Inc., Mahlon E. Hahn, William S. Forrest, Marvin E. Horton, W. D. Melzer, Byrn Cliff Seafood Corp., Inc., Joseph Melzer, Mervin Lozaw, plaintiffs, against Hampton Roads Sanitation District Commission (Hampton Roads), and the City of Newport News (Newport News), defendants. Thereafter Carrie Carter and Joseph Melzer were dismissed as plaintiffs, and Evelyn Hines, Cranston Morgan and Nelson Firth, Sr., were added as intervenor plaintiffs.

Jurisdiction is alleged under Title 28 U.S.C. §1331 as involving questions under the Constitution and Laws of the United States and on Title 28 U.S.C. §1333 upon the theory of maritime tort.

The Complaint charges that the plaintiffs are lessees of various oyster grounds located in the Warwick River in the City of Newport News. The defendant, Hampton Roads, operates a sewerage treatment plant adjacent to the Warwick River with an outfall line into that River. The defendant, Newport News, operates the lines, laterals, and pumping stations in the area sewerage collection system.

It is claimed that the defendants have caused untreated and partially treated sewerage to be discharged into the Warwick River and its estuaries, which has resulted in the pollution of the River. As a result of high coliform counts the Warwick River in which the plaintiffs have oyster grounds was closed by the Virginia Health Department for the purpose of harvesting and marketing oysters on March 29, 1972. The plaintiffs contend that the value of their oyster leases and the

oysters thereon have been destroyed and seek damages of both defendants on two theories: (1) negligence; and (2) the taking of property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The matter has been vigorously contested by the defendants at every stage of the proceedings. They initially responded to the complaint with motions to dismiss on grounds that the complaint failed to allege a cause of action.

After hearings upon those motions, this Court issued an extensive Opinion and Order on March 20, 1973, to which reference is made and which is incorporated herein. In that Opinion, we found that Darling v. City of Newport News, 123 Va. 14, 96 S.E. 307, aff'd, 249 U.S. 540(1919), holding that the right of the City to empty raw sewer-

age into Hampton Roads was a public right, had lost vitality in the face of later clear and explicit state legislative action to the contrary. The year-by-year march of the General Assembly of Virginia away from the Darling position was documented.

In that Order we specifically said:

> "We make no comment at this point as to the depth of any claim of plaintiffs for civil damage or injunctive relief. It would appear that both Hampton Roads Sanitation District Commission and the City of Newport News are immune from liability for negligent tortious conduct. (Footnote omitted). We note further that Section 62.1-44.15 (14) of the Virginia Code expressly provides that otherwise unlawful dumping of untreated or improperly treated sewerage 'may be justified' under certain circumstances."

We therefore, reserved comment on liability pending production of further evidence in either appropriate discovery proceedings or at trial.

About a year later further oral arguments were heard on additional motions of the defendants to dismiss on the theory of

the immunity of these defendant state agencies acting in their governmental capacities from suits in tort. In a second Opinion and Order, entered January 29, 1974, and incorporated herein, we found that Hampton Roads was, according to the language of the charter, a creature of the Legislature which was to perform a governmental function in the construction and operation of a sewerage disposal system and with Newport News, a municipal corporation and political subdivision, would enjoy immunity from negligence suits while acting in a governmental capacity. We again expressed our concern as to whether these state agencies could be held responsible for a taking within the ambit of the Fifth or Fourteenth Amendments. We acknowledged, however, that these defendants, in spite of charter language, might be liable for tortious injury if it was concluded that their operation of a

sewerage disposal system was a proprietary function. We directed that the suit should continue to give the plaintiffs the opportunity to introduce evidence at a trial, either that they had been unconstitutionally deprived by the defendants of property rights without due process or just compensation, or, that the defendants were negligent and that such negligence occurred when the defendants were engaged in a proprietary function.

On June 3, 4, 5 and 6, 1974, this litigation came on for trial before a jury at Newport News. At the conclusion of the plaintiff's evidence, Hampton Roads moved for a directed verdict. We sustained that motion and stated in the record that we would later record our reasoning, which we now do.

It was apparent at the conclusion of plaintiff's evidence that no evidence had been developed in any way to show that

Hampton Roads was guilty of any negligence whatsoever. There was no evidence that the James River Plant of Hampton Roads had overflowed or had functioned improperly or that untreated affluent pollutants had been deposited in the Warwick River through any action of Hampton Roads. The plaintiffs agreed to this and acknowledged on the record that their only claim against Hampton Roads was under the Fifth and Fourteenth Amendments. They argued that a buffer zone against the harvesting of oysters which had been established around the area of the James River Disposal Plant outfall by the State Department of Health was a taking by Hampton Roads without compensation under the Fifth and Fourteenth Amendments. No evidence was produced that Hampton Roads had anything to do with the creation of that buffer zone. It was established by the State Health Department under health standards and authority

extant since the 1930's. Hampton Roads had exercised its power of eminent domain to condemn and pay for that part of the bottom that it was physically using for its outfall line.

The action of the State Board of Health in Shellfish Restrictive Order No. 55, establishing the buffer zone at the outfall of Hampton Roads' James River sewerage disposal plant, was pursuant to Section 28.1-175, Code of Virginia, 1950, Amended.

Similar action closing the identical area of the Warwick River had been directed by the State Board of Health under authority of the same statute on many occasions prior to the opening of the James River plant in 1967. The entire River had been closed in 1942 and again in 1962.

No attack on the constitutionality of Title 28.1 of the Virginia Code affecting shellfish, nor to the health standards

thereunder, was raised by the plaintiffs in this suit. There was no evidence that any plaintiff had availed himself of the express provisions of Title 28.1-178, Code of Virginia, 1950, Amended, to have the restriction released.

The provisions of Title 28.1-175 of the Code of Virginia protecting the health of the public are an undoubted proper exercise of the police power of the State. In Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E. 2d 153, 160 (1955), the Virginia Supreme Court quoting, with approval, 25 Am.Jur., Health, §24, said "A Statute empowering a State board of health to prohibit the use of water or ice from any given source where, in the opinion of the board, the use thereof endangers the public health is valid, and does not offend against the constitutional provision respective personal liability."

The exercise by the State of that proper

police power was not an illegal "taking" of property under the Fifth and Fourteenth Amendments, certainly not by Hampton Roads, who did not seek or declare the buffer zone. We so held in directing a verdict in favor of Hampton Roads, we now so hold as to the City of Newport News.

In Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987 (1962), Mr. Justice Clark for a unanimous court, declared the principles of Mugler v. Kansas, 123 U.S. 623, to be good law, i.e.:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injuries to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." 123 U.S. 668, 669, quoted at 369 U.S. at 593.

The only real issue remaining at the trial in June, 1974, after Hampton Roads had been dismissed as a party defendant,

was whether Newport News had been guilty of negligence, and if so, whether it was legally answerable for that negligence.

We declined the invitation of the City of Newport News to release it on a directed verdict because we believed that the plaintiffs, having demanded a jury, had a right to have that jury determine whether the City had been guilty of any negligence, a factual question. The Court, though overruling the City's motions, expressed grave misgivings that the City would be liable in any event.

The evidence at trial showed that certain pumping stations in the sewerage collection lines operated by Newport News, designated as Stoneybrook #1, Stoneybrook #2, and Eastwood or Lucas Creek, persistently overflowed raw sewerage over a protracted length of time in the period 1970-1972. These stations are located on

a brach of the Warwick River where the River is little more than a ditch, four-five feet wide. The pumping stations are four to five miles from the oyster leases here under closure. Expert testimony was available to the jury from which the jury could find that these sewerage overflows would form the basis for the high coliform count which dictated the closure of the Warwick River to oystering.

Answering by way of a special verdict form the jury foudn that the poor water quality (high coliform count) in the Warwick River was caused by the overflows of the sewer system of Newport News; that the City was guilty of negligence in the operation of its sewer system; that the negligent operation of the City sewerage system was the proximate cause of the conditions requiring the closing of the River to harvesting shellfish.

Upon the return of the jury verdict,

the City of Newport News promptly moved for a judgment non obstante veredicto. The motion is now before us and is based on many grounds. Since we conclude that the plaintiffs are not entitled to recover from Newport News for two principal reasons, we will not review all of the objections which Newport News raised to the verdict.

We have already indicated elsewhere in this Opinion our judgment that Newport News could not be held liable upon the theory of an unlawful "taking" of oyster grounds in the Warwick River by the State Department of Health anent the high coliform count in the River. We enlarge on that to this extent. The action of Newport News was to build a system of collecting pipes and pumping stations to fulfill its obligations to its citizens to collect sewerage. The performance of this City function, that is, in the

construction of the system, is not the basis for the pollution problem in the Warwick River upon which the State Department of Health issued Closure Order No. 91 in March, 1972. The system had been in operation long before that date. It is the negligent failure of three pumping stations within that system on a temporary basis which may have accounted for the pollution. We have nothing more than a negligent impairment which is, at best, a tort. Columbia Basin Orchard v. United States, 132 F.Supp. 707 (Ct. Cl. 1955); Sanguinetti v. United States, 264 U.S. 146, 44 S.Ct. 264 (1924); Eriksen v. Anderson, 195 Va. 655, 79 S.E. 2d 597 (1954). Such an intermittent overflow as herein occurred in three pumping stations, subject to remedy, is negligence, not the exercise of eminent domain.

NEGLIGENCE ISSUE

We conclude that the City of Newport News in the operation of its sewerage collection system, was engaged in a governmental function and as such, is immune from negligence.

A municipality in Virginia is immune from liability for negligence in the performance of its governmental functions. Fenon v. City of Norfolk, 203 Va. 551, 125 S.E. 2d 808 (1962); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939):

> "The 'governmental-proprietary'distinction in municipal immunity is theoretically based on the nature of municipal corporations. The municipal corporation is both a corporate and governmental unit. As a corporation it is liable to the same extent as any private individual, but as a governmental unit, it is an agent of the state and hence a sovereign body. The governmental-proprietary destruction is, therefore, a translation of these two identities into tort liability." See 18 McQuillin, Municipal Corporations, Section 53.01a (3d Rev.Ed. 1963)."

In Virginia, the duty of the preservation of the public health is one we find to devolve upon the City as a sovereign power and is a "governmental" function.

In a case involved with the removal and collection of garbage, which certainly approximates the sewerage disposal obligation of a City, the Supreme Court of Virginia, said in Ashbury v. City of Norfolk, 152 Va. 178, 147 S.E. 223 (1929):

> "With respect to matters concerning the public health, * * *there is no serious conflict of reason, opinion, or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolves upon the State as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the State, the State is acting strictly in the discharge of one of the functions of government. If the State delegate to a municipal corporation, either by general law or by particular statute,

> this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation, likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation but of the citizens of the Commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such power is entitled to the same immunity against suit as the State itself enjoys; * * * it can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health." Ibid at 285, 286, quoting from Love v. Atlanta, 95 Ga. 129 (1894).

This view is supportive of the declaration of the Supreme Court of the United States in City of Trenton v. State of New Jersey, 262 U.S. 182 (1923):

> "It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and

courthouse, the protection of the city's inhabitants against disease and unsanitary conditions....." 262 U.S. at 191. (Emphasis added).

And in Taylor v. City of Newport News, 214 Va. 9, 197 S.E. 2d 209 (1973), the garbage collection function was held to be governmental.

The function of the disposal of sewerage is accomplished, not for the special benefit of the municipality, but is for the common good of all, being intimately connected with the public health.

In the Act validating the creation of the Hampton Roads Sanitation District, Chapter 66, Acts of Assembly 1960, the legislature specifically provided in Section 31 that "(t)he exercise of the powers granted by this act shall be in all respects for the benefit of the inhabitants of the Commonwealth and for the promotion of their safety, health, welfare, convenience and prosperity and as the operation and

maintenance of the sewage system by the Commission, will constitute performance of essential governmental functions." (Emphasis added).

Section 32 of that Act, in part, provides:

"...the sewage system of the District shall be exempt from any and all liability which may be incurred by or imposed upon the Commission or any county, city or town or political subdivision." (Emphasis added).

It would seem logical to conclude that if the sewage system of Hampton Roads was officially declared to be a governmental function then the connecting lines and laterals of the City of Newport News were, in the eyes of the legislature, to be afforded the same treatment not only by the specific language of Chapter 32 above, but by analogy to Chapter 31, and the statement of governmental function as therein contained. The nature of the function being performed does not change as the affluent leaves the lines of Newport

News and enters the system of Hampton Roads.

Sewer facilities and their construction and operation were held to be a governmental function in Register v. H. Burton Elliott, Inc., 229 A.2d (Dela. 1967). Sewer systems in the State of Texas are a governmental function of municipalities, see City of Texarkana v. Taylor, 490 S.W. 2d 191 (Tex. 1972); Fidelity Land & Trust Co. of Texas v. City of West University Place, 496 S.W. 2d 116 (Tex. 1973). So also in Florida a sewerage disposal system is a governmental function, Buchanan v. City of Miami, et al., 49 S.2d 336 (Fla. 1950); AIA Mobile Home Park, Inc. v. Brevard County, 246 S.2d 126 (Fla. 1971). So also in Georgia, City Council of Augusta v. Cleveland, 148 Ga. 734, 98 S.E. 345 (1919); City of Douglas v. Cartrett, 109 Ga. App. 683 (1964), 137 S.E. 2d 358.

We do not regard the decision in Chalkley v. City of Richmond, 88 Va. 402, 14 S.E. 339 (1891), to be definitive on the governmental immunity problem here presented. In that case the City had attempted to correct a defect in an underground culvert of substantial size. In so doing, the former smooth curves in its course had been replaced by apparent right angle turns and as a result, the flood waters invaded a cellar. The condition had existed for 12 years with constant repercussions. The liability of the City was based on its creation of a nuisance. (Page 341).

Nor do we find City of Richmond v. Wood, 109 Va. 75, 63 S.E. 449 (1909), to be controlling. The case was decided upon pleadings and evidence problems, with very little information available on the nature of the difficulty, except that like Chalkley, it would appear that the City

had created a nuisance in the construction of a storm drain that was too small. Nuisance was the binding ingredient in each case.

In the instant case, the sewer system was not a nuisance in a legal sense. On a temporary basis, three pumping stations did overflow. It occurred in an area which was rapidly expanding populationwise. There were isolated occasions when conditions arose to apparently overload the facility. The City made diligent efforts to overcome the difficulty by enlarging pump capacity and modifying the system. The occasional discharge was not on to the private property of residents at the pumping sites, but into the reaches of the Warwick River. The raised fecal coliform count on the oyster leases was 5 miles distant.

The City was not maintaining a nuisance. At the most it could only be answerable

to a charge of negligence in the temporary failure of pumps in a sewerage collection system, a sewerage collection obligation thrust upon it by the State. These were not the conditions at the time of Chalkley, supra, or Wood, supra. As the duty now exists the municipality has no alternative to discharge the affluent into the River, as in Darling, supra, but must only convey to a sanitation disposal system operated by another state agency.

REQUIREMENTS OF NOTICE OF CLAIM

For purposes of appeal, we likewise find that the plaintiffs failed to give the sixty day statutory notice of their claim against the City of Newport News.

Section 8-653, Code of Virginia of 1950, Amended, as applicable in 1972, read as follows:

"§ 8-653. Notice to be given cities and towns of claims for damages for

negligence.--No action shall be maintained against any City or town for injury to any person or property or for wrongful death alleged to have been sustained by reason of the negligence of the city or town, or of any officer, agent or employee thereof, unless a written statement by the claimant, his agent, attorney or representative of the nature of the claim and of the time and place at which the injury is alleged to have occurred or been received shall have been filed with the city attorney or town attorney, or with the mayor, or chief executive, within sixty days after such cause of action shall have accrued, except that when the claimant is an infant or non compos mentis, or the injured parties dies within suxh sixty days, such statement may be filed within one hundred and twenty days; and statements pursuant to this section shall be valid, notwithstanding any contrary charter provisions of any city or town.

"This section as amended shall take precedence over the provisions of all charters and amendments thereto of municipal corporations in conflict herewith heretofore granted. It is further declared that as to any such future charter or amendment thereto that any provision therein in conflict with this section as amended shall be deemed to be invalid as being in conflict with §52 of the Constitution unless such conflict be stated in the title to

such proposed charter or amendment thereto by the words 'conflicting with § 8-653 of the code' or substantially similar language. (1938, p. 360; Michie Code 1942, § 6043a; 1954, C.427)."

Closure of the Warwick River was ordered March 29, 1972. Suit was filed in September, 1972. No notice was given to the City of Newport News by the plaintiffs in this action. No notice was averred in the complaint. No notice was proved to have been given. The City of Newport News raised the notice issue in its first motion to dismiss. The notice is mandatory. The City of South Norfolk v. Dail, 187 Va. 495, 47 S.E. 2d 405 (1948); Daniel v. City of Richmond, 199 Va. 490, 100 S.E. 2d 763 (1957). The argument is made that Newport News had notice because residents of the area of the sewerage overflow reported such overflow to the City. These reports were not from the claimants in this case. The further

argument that notice is not required in an admiralty case (The West Point, 71 F. Supp. 206 (E.D. Va. 1947) is not applicable here. This negligence action relied upon acts of Newport News several miles removed from the navigable waters. A maritime aspect was only in the claim that oysters in navigable waters became a damage item.

There is no "combination of maritime wrong and maritime location", nor is it a wrong involving shipping or commerce, as these two tests are suggested in McGuire v. City of New York, 192 F.Supp. 866 (S.D.N.Y. 1961). In this circuit in Hastings v. Mann, 226 F.Supp. 962 (E.D.N.C. 1964), aff'd 340 F.2d 910 (4th Cir. 1965), the court held that the tort, to be maritime and in admiralty, ought to be based on some element of maritime wrong and maritime situs.

At trial, from the bench, we orally found that no evidence of negligence had

been produced by plaintiffs against Hampton Roads Sanitation District Commission, nor did liability arise to Hampton Roads Sanitation District Commission, on the theory of a "taking" within Constitution prohibitions. For the reasons now further stated herein, we affirm that position and DISMISS this action as to Hampton Roads Sanitation District Commission.

We also find, for the reasons stated herein, that no liability attaches to the City of Newport News under the theory of a "taking" in contradiction to the Fifth and Fourteenth Amendments to the United States Constitution.

And we now further find that despite a jury verdict that the City of Newport News was negligent in the operation of its sewerage collection system that it is nonetheless immune from civil prosecution for negligence by these plaintiffs in its operation of that system, as the same is

a governmental function.

The motion for a verdict in favor of the defendant, City of Newport News, notwithstanding the jury determination that the City of Newport News was negligent, is hereby GRANTED, and this action is DISMISSED as to the City of Newport News.

It is so ORDERED.

4TH CIRCUIT COURT OF APPEALS

On Appeal From Eastern District
of Virginia, Newport News Division

No. 75-1576
75-1577
75-1578

WILLIAM A. MOORE, ET AL.,

Appellants-Cross-Appellees

v.

HAMPTON ROADS SANITATION DISTRICT COMMISSION
and

CITY OF NEWPORT NEWS,

Appellees-Cross-Appellants

OPINION AND ORDER

July 13, 1977

4TH CIRCUIT COURT OF APPEALS

On Appeal From Eastern District
Of Virginia, Newport News Division

Before CRAVEN, Circuit Judge, FIELD, Senior Circuit Judge, and THOMSEN, Senator District Judge.*

THOMSEN, Senior District Judge.

Claiming jurisdiction under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 133 (admiralty and maritime jurisdiction). plaintiffs' complaint alleged that the value of oyster beds in the Warwick River leased to them by the Commonwealth of Virginia has been destroyed as a result of improper operation of a sewage disposal system by defendnats, City of Newport News (City) and Hampton Roads Sanitation District Commission (Commission). From a judgment entered in favor of defendants after

*Sitting by designation.

trial, plaintiffs have appealed.[1] Plaintiffs base their claims against the City on alleged negligence, nuisance and taking of their property without just compensation; they base their claims against the Commission only on an alleged taking.

Leases of underwater beds for cultivation and harvesting of oysters are granted by the Commonwealth for a term of 20 years at an annual rental of $1.50 per acre or fraction thereof, renewable by the lessee after each term, and are treated as chattels real under Virginia law. Va. Ann. Code, 1973 Repl. Vol., §28.1-109(12).

The Warwick is a small river which empties into the James a short distance northwest of Hampton Roads. The few miles with which we are concerned, in

[1] The City and the Commission have cross-appealed from an interlocutory order denying their motions to dismiss the action, in order to preserve their contention that they had an unqualified right to discharge sewage into the Warwick River.

which the oyster beds leased to plaintiffs are located, lie between the lower part of Fort Eustis and the City of Newport News and are navigable and tidal. The State Health Commissioner has closed and reopened the Warwick River or portions thereof to direct marketing of oysters a number of times since 1941.

The City has for many years operated pumping stations which pump sewage to sewage plants operated by the Commission. On several occasions these pumping stations have overflowed into the Warwick River. In 1962 the State Health Commissioner prohibited the harvesting of oysters in the entire river for a short period; that closure is not the basis of any claim in this case. By 1966 portions of the river had been released from that prohibition; however, in 1966 one or more pumping stations overflowed and the State Health Commissioner again closed, due to the

high coliform counts, the northern portion of the river in which the beds of several plaintiffs were located. In 1972 there were additional pumping station overflows and the central portion of the river, in which the beds of some of the plaintiffs are located, was closed. The statute under which the closures were made permits transplanting of oysters from closed areas into approved areas if a special permit is obtained. Va. Ann. Cod, 1973 Repl. Vol., §28.1-179. Some of the plaintiffs took advantage of this provision, but the evidence indicates that the results were not satisfactory.

During all material times the Sanitation Commission has operated sewage treatment plants in the area. Since 1967 the Commission has operated the James River Sewage Treatment Plant, which discharges treated sewage into the water at the mouth of the Warwick. In that year the

conclusion of all the evidence, the judge submitted to the jury three "inquiries" which the jury answered to the effect that: (1) the high coliform count in the Warwick River which was the reason for the 1966 and 1972 closures was proximately caused by the maintenance and operation of the sewer system of the City; (2) the City was guilty of negligence in the operation and maintenance of its sewer system as the same affected the Warwick River; and (3) such negligence was a proximate cause of conditions requiring the closure of the Warwick River.

The City thereafter filed a motion for

---

[3]-continued:
for its outfall line, and that the buffer zone had been established by the State Health Commissioner under the authority of §28.1-175 et seq., of the Virginia Code, the court held that teh closure was an appropriate exercise of the State's police power and did not constitute a taking of the plaintiffs' property by the Commission.

State Health Commissioner closed for the direct marketing of oysters and other shell fish (in accordance with Food and Drug Administration requirements) a buffer zone around the outfall opening.[2]

The case came on for trial before a jury on issues of liability, issues of damages being reserved. At the conclusion of plaintiffs' evidence the district judge directed a verdict in favor of defendant Commission, ruling that no case against it had been proved on any ground.[3] At the

---

[2]The Health Commissioner acted under the provisions of Va. Ann. Code, 1973 Repl. Vol., §28.1-175 et seq.

[3]The court noted that there had been no evidence that the Commission had been quilty of any negligence or that its plant had overflowed or functioned improperly. The plaintiffs conceded these points but contended that the buffer zone which had been established around the area of the plant's outfall constituted an unconstitutional taking of their property without compensation. Observing that the Commission in exercise of its power of eminent domain had paid for that part of the river bottom which was physically used

judgment n.o.v. which the district judge granted on the grounds that the action against the City is barred (1) by the doctrine of sovereign immunity, and (2) by the failure of the plaintiffs to give the City the 60-day statutory notice of their claims provided for in Va. Ann. Code, 1957 Repl. Vol., §8-653, as it read before the 1973 amendment thereto.[4] Plaintiffs' appeal challenges both of these rulings, as well as the district court's ruling that there was no exercise of eminent domain by the Commission. Before resolving these questions, we will discuss the issue raised by defendants'

[4]In considering the post-verdict motion, the court referred to the evidence that certain pumping stations in the sewage collection lines operated by the City had permitted raw sewage to overflow during the period 1970-72. While these pumping stations were located some four to five miles from the oyster beds which were closed in 1972, the court properly concluded that there was evidence from which the jury could find that these overflows were the source of the high coliform count which resulted in the closure.

cross-appeals (see no. 1 above).

The City and the Commission challenge the ruling of the district court that there is no longer an unqualified public right to discharge sewage into tidal streams. The Commission argues that it has not been shown to have violated any provision of Virginia Law governing water pollution, and therefore the closing of oyster grounds by the State Health Commissioner due to a pollution hazard was a risk to which the lessees were subject when they took their leases. The City argues that occasional discharges of untreated sewage into the Warwick River do not violate the legislative policy against pollution, and that the oystermen took their leases subject to the risk of such occasional discharges.

The common law right of the public to dump sewage in tidal streams was recognized in a line of cases applying Virginia law

decided during the period 1916 to 1939. Hampton v. Watson, 119 Va. 95, 89 S.E. 81 (1916); Darling v. Newport News, 123 Va. 14, 96 S.E. 307 (1918), aff'd 249 U.S. 540 (1919); Commonwealth ex rel. Atty. Gen. v. Newport News, 158 Va.521, 164 S.E. 689 (1932); DuPont Rayon Co., Inc. v. Richmond Industries, Inc., 85 F.2d 981 (4th Cir. 1936); Old Dominion Land Co. v. Warwick County, 172 Va. 160, 200 S.E. 619 (1939). In Darling, the Supreme Court, speaking through Justice Holmes, agreed with the Virginia court that "when land is let under the water of Hampton Roads, even though let for oyster beds, the lessee must be held to take the risk of the pollution of the water". 249 U.S. at 543. The Court held that the grant was subject to the right of the State to authorize the City of Newport News to discharge its sewage into the Roads, and that the consequent pollution of the plaintiff's

oysters was neither a taking of his property without due process nor an impairment of his contract rights.

Since 1939, however, Virginia has imposed ever-stronger controls on the discharge of sewage into state waters. A Virginia statute now prohibits the discharge of raw sewage into such waters. Va. Ann. Code, 1973 Repl. Vol., §62.1-44.5. We conclude that whether or not the discharges of raw sewage by the City can be characterized as occasional, they are not now protected by the public policy of the State, and plaintiffs' rights to cultivate oysters are not subject to a right of the City to violate state law.[5]

---

[5]The City argues that occasional discharges are permitted by Va. Ann. Code, 1973 Repl. Vol., §62.1-44.4 (2), which requires the maintenance of high water quality only "where physically and economically feasible". Section 44.4 (2) applies only to water whose quality is "better than the established standards as of the date on

The Commission, however, has not been shown to have violated any statutory or regulatory provision. The public right to discharge sewage into the Warwick has been qualified by the legislature only to the extent provided by the pollution control statutes. The Commission, in exercising its statutory right to discharge treated sewage into the Warwick, abridged no rights of the plaintiffs, who took their leases subject to the risk of closure due to lawful discharges.

[5]-continued:
which such standards become effective***". Although the precise standards set for the Warwick River by the State Water Control Board are not in the record, the Board is required to adopt standards consistent with the general policy of that statute, which protects aquatic life, inter alia, from the detrimental effects of pollution. Va. Ann. Code, §62.1-44.5 (2). The water quality of the Warwick has not been shown to be above any legitimate standards set by the Water Control Board; therefore, Virginia law prohibits such "occasional" discharges of raw sewage as the City caused in this case.

Because we agree with the district judge that there was no evidence sufficient to prove a case against the Commission on grounds of negligence, nuisance or a taking by the Commission, the judgment in its favor must be affirmed, whether Virginia law or admiralty principles should be applied.[6] The case against the City, however, requires us to consider whether its liability on grounds of negligence, nuisance and eminent domain is controlled by Virginia law, maritime law or other federal law.

The Warwick River in the area of the beds involved in this case is a navigable stream, subject to the ebb and flow of the tides. Harvesting oysters and clams, like fishing, is a traditional maritime

[6]The closing of the beds was ordered by the State Health Commissioner, acting under the police power of the Commonwealth. Defendant Hampton Roads Sanitary Commission had no authority to order such closure.

activity; the cultivation of oysters is so closely related to the harvesting of oysters that interference with cultivation which impairs harvesting also meets the situs and nexus tests established by Executive Jet Aviation V. Cleveland, 409 U.S. 249 (1972), and comes within the admiralty and maritime jurisdiction. Union Oil Co. v. Oppen, 501 F.2d 558, 560-63 (9th Cir. 1974); Potomac River Ass'n Inc., v. Lundeberg Md. Sea. Sch., Inc., 402 F. Supp. 344, 358 (D.Md.1975); Burgess v. M/V Tamano, 370 F. Supp. 247 (D.Me.1973); State Dept. of Fish and Game v. S.S. Bournemouth, 307 F. Supp. 922 (C.D.Calif. 1969((decided prior to Executive Jet).[7]

---

[7]The Submerged Lands Act, 43 U.S.C. 1301 et seq., recognized in §1311 (a) the right of the several states to manage, administer, lease, develop and use lands beneath the navigable waters within the boundaries of each state in accordance with applicable State law, but provided in §1311 (d) that

Whether in a particular case an admiralty court will adopt state law or fashion its own principles for application depends upon whether the adoption of state law would impair the uniformity of admiralty law, and whether there is some admiralty principle which preempts state law. Workman v. New York City, 179 U.S. 552 (1900); St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974); In re M/T Alva Cape, 405 F.2d 962 (2nd Cir. 1969).

All of the parties in this case are Virginians; there is no such interstate problem as was involved in Illinois v. Milwaukee, 406 U.S. 91 (1972), and Texas v. Pankey, 441 F.2d 236 (10th Cir.1971). Cf. Committee for the Consideration of the Jones Falls Sewage System v. Train, ____

---

[7]-continued:
nothing in the Act should affect the control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation.

F.2d _____(4th Cir. 1976). The absence of any interstate factor reduces but does not eliminate the importance of the uniformity element in the decision.

Virginia law controls the construction of the Virginia statutes and the nature and extent of the rights which plaintiffs acquired under their leases. The problem is whether Virginia law should control (1) the question whether the City is immune from liability in such a suit as this and (2) the applicability to this case of the requirement of notice contained in §8-653 of the Virginia Code, the two points upon which the district judge based his decision to enter a judgment n.o.v. in favor of the City.

Under Virginia law a City is immune from liability for negligence in performing governmental functions, but not for negligence in performing proprietary functions. Fenon v. City of Norfolk,

203 Va. 551, 125 S.E. 2d 808(1962). However, the Virginia law with respect to which activites of a municipal corporation are governmental and which are proprietary is far from clear. Taylor v. City of Newport News, 214 Va. 9, 197 S.E. 2d 209 (1973) (collection of garbage held to be a governmental activity); Fenon v. City of Norfolk, supra (removal of fallen trees from streets after a hurrican is governmental activity); City of Norfolk v. Hall, 175 Va. 545, 9 S.E. 2d 356 (1940) (maintenance of public streets and sidewalks is proprietary activity); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939) (operation of swimming pool is proprietary activity); Ashbury v. City of Norfolk, 152 Va. 278, 147 S.E. 223 (1929) (removal of garbage by municipality is governmental activity).

On the other hand, the weight of admiralty authority which has been cited

or found is in line with those state decisions which have increasingly repudiated or narrowed the immunity of municipal corporations when performing governmental functions. Workman v. New York City, 179 U.S. 552 (1900); In re M/T Alva Cape, 405 F.2d 962 (2nd Cir. 1969): Principe Compania Naviera, S.A. v. Board of Commissioners, 333 F. Supp. 353 (E.D. La. 1971); Kelley Island Lime & Transport Co. v. City of Cleveland, 47 F. Supp. 533 (N.D. Ohio 1942); 1 Benedict on Admiralty, 7th Ed., (1974), §112, at 7-37 et seq. Cf. J. Ray McDermott & Co., Inc. v. Department of Highways, State of La., 267 F. 2d 317 (5th Cir. 1959); Broward County, Fla. v. Wickman, 195 F.2d 614 (5th Cir. 1952). For a full review of state cases, see Long v. City of Wierton, 214 S.E. 2d 832 (W.Va. 1975).

We have grave doubts whether, in the light of the most recent Virginia cases,

the Virginia court would extend immunity to the City in such a case as this. It is not necessary to decide that question, because we conclude that maritime law principles should be applied, and that, applying those principles, the City is not immune from liability for such negligence as has been shown in this case.

There remains the question whether plaintiffs' claims are barred by their failure to give notice to the City within 60 days after the respective causes of action accrued. Here again, we conclude that maritime law principles should control and that the issue should be decided by applying the doctrine of laches rather than by applying the 60 day notice statute.[8] Since all facts with respect

---

[8]In the following cases admiralty courts have refused to apply state notice statutes in a variety of situations: Raymond International v. M/T Dalzellegle, 336 F. Supp. 679 (S.D.N.Y.1971); Fematt v. Los Angeles, 196 F. Supp. 89 (S.D.Calif. 1961); Morales

to laches may not have been fully developed in the district court, evidence and argument with respect thereto should be considered by the district judge on remand.

The district judge concluded that the City was not maintaining a nuisance. Even if that conclusion were not correct, plaintiffs would not be entitled to an injunction against the City's operation of its sewage system, and the damages, if any, to which a plaintiff might be entitled would not exceed the damages recoverable for negligence.

The judgment in favor of the defendant Commission is affirmed.

The judgment in favor of of the defendant City is reversed and the case is remanded for further proceedings consistent

8-continued:
v. Galveston, 181 F. Supp. 202 (S.D. Tex. 1959), aff'd on other grounds, 370 U.S. 165 (1962); The West Point, 71 F. Supp. 206 (E.D. Va. 1947); Frame v. New York, 34 F. Supp. 194 (S.D.N.Y. 1940).

with this opinion.

Affirmed in part,
reversed in part, and
remanded.

FIELD, Senior Circuit Judge, concurring in part;
dissenting in part.

While I agree with much that is in the majority opinion, I cannot concur with my brothers in their conclusion that the destruction of the plaintiff's oyster beds was a maritime tort in falling within the admiralty jurisdiction of the court. My reading of Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), indicates that the maritime nexus requisite for admiralty jurisdiction is a "relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters." (Emphasis added) Id., at 256. We recognized the restrictive nature of such a nexus in declining admiralty jurisdic-

tion of the aquatic accidents in Crosson v. Vance, 484 F.2d 840 (4 Cir. 1973), and Onley v. South Carolina Electric & Gas Co., 488 F. 2d 758 (4 Cir. 1973), and in my opinion the cultivation of oysters is not a traditional form of maritime commerce and navigation which would support admiralty jurisdiction in this case. I think my conclusion on this point is consonant with the jurisdictional philosophy of Executive Jet, but it does not rest on that alone for it is based upon decisions of the Court extending back well into the last century.

In Smith v. Maryland, 59 U.S. 71 (1855), a Maryland statute regulating the harvesting of oysters in its waters was challenged on the grounds that it was repugnant to the commerce clause of the Constitution and conflicted with the admiralty jurisdiction of the United States. In upholding the statute, the Court noted

that "(w)hatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, ***." Id., at 74. On the question of admiralty jurisdiction the Court said:

> "But we consider it to have been settled by this court in United States v. Bevans, 3 Wheat 386, that this clause in the Constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." Id., at 76.

Some years later in McCready v. Virginia, 94 U.S. 391 (1876), the Court had occasion to consider the authority of

Virginia to regulate oyster cultivation in its tidal rivers. Again recognizing that each state owns the beds of all tidal waters within its jurisdiction, the Court stated:

> "The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, * * *." Id., at 394-395.

Concluding that the Virginia statute did not violate the commerce clause, the Court observed that "(t)here is here no question of transportation or exchange of commodities, but only of cultivation and production." Id., at 396. The jurisdictional principles of Smith and McCready were recognized and reaffirmed in Manchester v. Massachusetts, 139 U.S. 240 (1891).

Additionally, the authority of the

states over shellfish cultivation was specifically recognized by the Congress in the Submerged Lands Act of 1953, 43 U.S.C. §1301, et seq.[9] The construction and application of this legislation has been consistent with the venerable decisions upon which I rely, and in Corsa v. Tawes, 149 F.Supp. 771 (D.Md. 1957), aff'd. 335 U.S. 37, Judge Sobeloff discerned the legislative purpose as follows:

---

[9] 43 U.S.C. §1311(a) reads in pertinent part as follows:

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use such lands and natural resources all in accordance with applicable State law be, * * *vested in and assigned to the respective states."

Oysters are included within the term "natural resources" as defined in the Act. 43 U.S.C. § 1301(e).

> "Congress has not sought to impose uniformity, but has been content to leave the matter to local authority and has recently made this intention explicit in the Submerged Lands Act of 1953." Id., at 773.

While it is true that the Act provides that nothing in it shall affect the Constitutional rights of the United States to regulate or improve navigation or to provide for flood control or the production of power,[10] none of these rights so reserved have any operative bearing upon the case before us.

In the light of this legislation and the decisions of the Court, I think it is clear that the cultivation of oysters in the Warwick River was a purely local activity subject to the laws and jurisdiction of the State of Virginia, and that

---

10 43 U.S.C. § 1311 (d).

the City's negligent intrusion upon the plaintiffs' oyster beds was not a maritime tort.[11] Under these circumstances, the plaintiffs do not fall within the admiralty exception to the statutory notice requirement, and their failure to comply therewith barred their cause of action against the City.

On Petition for Rehearing En Banc

Before HAYNSWORTH, Chief Judge WINTER, CRAVEN, BUTZNER and RUSSELL, Circuit Judges FIELD, Senior Circuit Judge, WIDENER and HALL, Circuit Judges, sitting en banc.

Reargued: March 15, 1977
Decided: July 13, 1977

FIELD, Senior Circuit Judge:

The plaintiffs filed this action charging that their oyster beds leased to them

---

11 The cases cited by the majority in support of its position on this point are not entirely opposite since each of them involved oil spills and liability was premised upon specific federal legislation, e.g., Rivers and Harbors Act of 1899, 33

by the Commonwealth of Virginia had been destroyed as the result of the improper operation of a sewage disposal system by the defendants, City of Newport News (City) and Hampton Roads Sanitation Commission (Commission). Jurisdiction was asserted under 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1333 (admiralty and maritime jurisdiction). The district court entered final judgment in favor of the defendants and the plaintiffs have appealed.

At the close of the plaintiffs' evidence the district court granted the Commission's motion for a directed verdict upon the ground that there was no evidence of negligence or other conduct on its part which would give rise to any liability.

---

11 (cont.) U.S.C. §407; Water Quality Improvement Act, 33 U.S.C. §1161(b)(2); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, et seq.

The trial continued with respect to the City and the jury found it guilty of actionable negligence. Despite the jury's finding, the court granted the City's motion for judgment n.o.v., concluding that the doctrine of sovereign immunity relieved it from liability from any negligent conduct. Alternatively, the court found that the failure of the plaintiffs to give the sixty day statutory notice of their claims as required by Section 8-653, Va. Ann. Code, 1957 Repl. Vol.,[1] barred them from recovery. Upon appeal the plaintiffs challenged the conclusion of the district court upon both of these issues.

When this appeal was initially heard a majority of the panel concluded that this case fell within the admiralty and mari-

---

[1] Section 8-653 was amended in 1973 but the plaintiffs' claims are governed by the statute as it stood prior to the amendment.

time jurisdiction of the court, and that under the weight of admiralty authority neither the Virginia doctrine of sovereign immunity nor the statutory notice requirement would bar the plaintiffs from recovery.[2] Rehearing en banc was ordered for consideration of the admiralty jurisdiction issue.

In finding that there was admiralty jurisdiction the panel majority observed that, like fishing, the harvesting of oysters is a traditionally maritime activity, and that the cultivation of oysters is so closely related to the harvesting that any interference therewith meets the situs and nexus test of Executive Jet Avaiation v. Cleveland, 409 U.S. 249 (1972). We are unable to agree, however, that the present case should be viewed in

---

[2] Moore v. Hampton Roads Sanitation Commission, Nos. 75-1576,77,78 (4 Cir., October 7, 1976),_____F. 2d_____.

the perspective of the entire spectrum of the oystering industry. Rather, in our opinion, the interests of the plaintiffs are purely local in their nature, and any alleged impairment thereof falls within the jurisdiction of the state and not the admiralty jurisdiction of the federal courts.

As heretofore stated, the plaintiffs' property rights in the oyster beds were dervied by leases from the State of Virginia. Recognition of the sovereignty and title of the states to lands underlying navigable waters within their boundaries goes back to the early days of the Republic. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). The title of the state to such lands stems from the Constitution itself, and the nature of such ownership was stated in Weber v. Harbor Commissioners, 85 U.S. (18 Wall) 57, 65-66 (1873):

> "Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters * * * (Emphasis added)

The sovereignty and jurisdiction of the states was recognized in Smith v. Maryland, 59 U.S. (18 How.) 71 (1855) where a Maryland statute regulating the harvesting of oysters in its waters was challenged on the grounds that it was repugnant to the commerce clause of the Constitution and conflicted with the admiralty jurisdiction of the United States. In upholding the statute, the Court noted that "(w)hatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil

by the State, * * *." Id., at 74. On the question of admiralty jurisdiction, the Court said:

> "But we consider it to have been settled by this court, in United States v. Bevans, 3 Wheat 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." Id., at 76.

Some years later in McCready v. Virginia, 94 U.S. (IV Otto) 391 (1876), the Court had occasion to consider the authority of Virginia to regulate oyster cultivation in its tidal rivers, and the purely local nature of such cultivation was stated as follows:

> "The planting of oysters in the soil covered by water owned in common by the people of the State is not

> in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water." Id., at 396.

Concluding that the Virginia legislation did not violate the commerce clause the Court observed that "(t)here is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade." Id., at 396.

In the light of these authorities, we think it is clear that the cultivation of oysters by the plaintiffs under leases from the State of Virginia is a purely local activity subject to the laws and

jurisdiction of the state[3], and that the City's negligent intrusion upon the plaintiffs' oyster beds was not a maritime tort. Our holding is, of course, a narrow one for we recognize that many activities incident to the harvesting of oysters may

---

3 The authority of the states over shellfish cultivation was explicitly recognized by the Congress in the Submerged Lands Act of 1943, 43 U.S.C. § 1301, et seq.

43 U.S.C. § 1311(a) reads in pertinent part as follows:

> "(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use such lands and natural resources all in accordance with applicable State law be* * *vested in and assigned to the respective States* * *."

Oysters are included within the term "natural resources" as defined in the Act. 43 U.S.C. § 1301(e).

properly be the subject of admiralty. Concededly, a collision involving an oyster boat or injury to a crewman on board such a vessel is as "traditionally maritime" as any other commercial activity involving the use and operation of vessels on navigable waters. However, damage to the plaintiffs' leaseholds from sewage discharges is not, in our opinion, related to the maritime aspects of the oystering industry.

The judgment of the district court is affirmed.

A F F I R M E D.

I hereby certify that pursuant to Rule 33 of the Rules of the Supreme Court of The United States that I mailed a true and correct copy of the foregoing to all Counsel of Record by depositing the same in a United States Mailbox, with First Class Postage Prepaid, addressed to Counsel of Record at his Post Office Address this 11 TH day of October, 1977.

William Mills Krieger